APPEAL NO. 93337

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp. 1993). On March 22, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He determined that appellant (claimant) reached maximum medical improvement (MMI) on July 16, 1992 with no impairment after having disability from (date of injury), through July 16, 1992. Claimant asserts that she has psychological problems arising from the injury from which she has not attained MMI, that the designated doctor did not examine claimant, that the hearing officer was biased, that the hearing officer questioned claimant, that the hearing officer asked leading questions of the claimant, that the hearing officer admitted documents prepared in anticipation of litigation, and that the hearing officer erred in making certain findings of fact including Finding of Fact No. 4 which said, "[c]laimant sustained a lumbar injury while working for Employer on (date of injury)." Respondent also conditionally appealed the disability determination. Respondent replied that the Appeals Panel should uphold the hearing officer as to MMI, impairment, and the absence of psychological injury.

DECISION

Finding that the decision and order are supported by sufficient evidence, we affirm. Claimant worked for (employer) on (date of injury), when she hurt her back. She was placing a box weighing 40 pounds or more into a larger box on a pallet, when the weight inside the smaller box shifted as she was placing it within the larger box. She felt a sharp pain in her lower back to the left of center. She notified her supervisor, and she was then sent to the "company doctor", (Dr. R). She has not worked in a job since that date. She testified that she still has pain. She stated that lifting and bending trouble her the most. She cannot stand in one position for an extended period. She has trouble sleeping for any period. She stated that her level of activity has stabilized. She does not think she has a psychological problem, but thinks she has a back problem; she is frustrated with the medical care she has received.

The medical records and carrier exhibit 8 show that claimant has seen the following doctors:

(Dr. B) (physical medicine) referred by Dr. R. On December 12, 1991, he found numbness in the left leg and believed she had a herniated disc at L 4-5, radiculopathy, pain, and anxiety. He did spinal injections. He saw her again on December 30 and January 6, 1992, at which time he said her nerve root swelling and irritation would continue to resolve, but he also noted "symptom magnification syndrome" and increased symptoms when being observed.

(Dr. C) the carrier's MEO doctor, saw claimant on February 10, 1992. He saw no herniation in the lumbar MRI. He stated, "(t)he patient appears to have a conversion reaction and full blown at this time. She is having a twitching abnormal perception of pain. . . she is not a good candidate for biofeedback

due to her overlying psychological disease."

(Dr. H), a neurologist, examined MRI's of the brain, lumbar spine, and cervical spine, plus the reports of other doctors who had seen claimant. He stated, "(t)his appears to be a conversion reaction. It is complex and associated with a history of injury to her back. The psychopathology is complicated. She needs additional treatment and ideally should be under a psychiatrist. I agree with (Dr. C) that she needs treatment with anti-depressant medicine or anxiolytics, and psychotherapy. I referred her to (Dr. S). The exact relationship between this psychopathology and her probably mild injury at work is complex."

(Dr. VW). Claimant states she was sent by the insurance company to see her, but that Dr. VW was in the process of moving and claimant saw (Dr. Sc) instead.

(Dr. Sc) saw claimant on July 16, 1992. While the record does not make his role clear, it may have been for pain management. We note that Article 8308-4.16 provides certain entitlements to medical examinations every six months with the same doctor, unless the commission approves otherwise, at the request of the carrier. Dr. Sc found that MMI had been reached on July 16, 1992, with 5% impairment. Dr. Sc noted muscular back pain with mild degenerative changes, but no evidence of disc herniation.

(Dr. Bl) saw claimant on July 31, 1992. Claimant stated that he was suggested to her by (EP), rehabilitation consultant to the carrier. Dr. Bl is an orthopedic physician specializing in spinal surgery. He referred to MRI exams which read within normal limits, and to other doctors' reports including that of Dr. H. Dr. Bl recorded that claimant's clinical response was "extremely erratic and not duplicatable and did not appear to be based on any organic disease." He found that she had had a low back strain "associated with chronic pain behavior." He then said, "I feel that any injury which may have occurred in December of 1991 has long since resolved. Her present symptom complex is related to her personal inability to relate to this injury. . . ." He estimated that a psychologist should help her to deal with her problems and that she would have disability for 8 to 12 weeks.

(Dr. St) is referred to by claimant as her choice of doctor. Dr. St saw claimant for the first time on August 26, 1992. He noted her history and examined her. His impression was lumbar disc disease and he called for more testing. When Dr. St next saw her on September 9th, he assessed her condition as "lumbar strain, bilateral nerve root irritation, worse on the left".

(Dr. O) was the designated doctor. Claimant was examined on October 12, 1992. Dr. O found that she had reached MMI on July 16, 1992 with a 0% impairment. He found the MRI's were normal so no specific disorders warranted a rating. He next reported that claimant invalidated the range of motion tests. He mentioned other tests, among them strength tests, which showed invalid results also. He stated, "this case appears to be one of psychosocial or psychological problems. There was no impairment that could be given based on the AMA Guides."

(Dr. J) was seen by claimant after Dr. H (*supra*) referred her to Dr. S, but Dr. S could not see her and referred her to (Dr. L), who could not see her, but referred her to Dr. J. Dr. J on March 1, 1993, advised claimant's attorney that he had seen claimant five times "in neuropsychiatric evaluation." He stated that she was physically impaired (he had said on February 5, 1993, that claimant had "undiagnosed physical back pain-probably a disc.") He advised more testing be done, such as a CAT scan. He added that as to emotionally, her prognosis is good.

Dr. Bl on March 17, 1993, indicated that he had had an opportunity to review the recommendation of Dr. J as to more testing. He discussed several methods used to validate certain testing that had been done in regard to claimant and spoke of the likelihood of "non-organic pain behavior". He said:

I cannot agree with her psychiatrist that the patient needs more diagnostic testing to workup her nonexistent organic disease. I would be more than happy if (Dr. J) confines his treatment to the matter at hand and applies sufficient effort to correct her grossly abnormal behavioral affect.

Claimant asserts that the hearing officer was biased but cites no example other than "the record." The record has been reviewed and no indication of bias has been noted, the issue was not raised at the hearing, and no motion that the hearing officer disqualify himself was made at the hearing. We find no bias such as discussed in Tex. Jur. 3rd Judges, §§ 27-29 (1986).

Claimant also indicates that the hearing officer examined the claimant as to "information that had not been addressed earlier by either party" and asked leading questions. The claimant refers to questions about a medical release to return to work which is relevant to the issue of disability, one of the stated issues at the hearing. Article 8308-6.34(b) of the 1989 Act calls for the hearing officer to "ensure. . .full development of facts required for the determinations to be made." Article 8308-6.34(e) of the 1989 Act also provides that conformity to legal rules of evidence is not necessary. The hearing officer committed no error in questioning the claimant, including the use of some leading questions.

Claimant objects to admission of carrier exhibits 4 and 11 as being prepared for litigation and being hearsay. Article 8308-6.34(e) allows the hearing officer to accept into evidence signed written statements. No proviso requiring that such statement be a regular business record is attached. In addition, as stated, the same article states that conformity to the rules of evidence is not necessary, so hearsay may be admitted. Finally, the same article provides that the hearing officer is the "sole judge. . .of the weight and credibility to be given to the evidence. . . ." Admission of these two documents was not error.

Claimant's appeal also states that Dr. O never examined the patient. Claimant testified that she met with Dr. O but "not very long." She said that he had other people in his office test her. She stated that Dr. O had the file of the other doctors' information and went over the results with her. The Appeals Panel has indicated that a designated doctor must perform an examination of the claimant. *See* Texas Workers' Compensation Commission Appeal No. 93095, dated March 19, 1993. However, the doctor does not have to perform all testing himself. *See* Texas Workers' Compensation Commission Appeal No. 93046, dated March 5, 1993. Since no question as to whether Dr. O examined the claimant was raised at the hearing, it will not be reviewed on appeal. *See* Texas Workers' Compensation Commission Appeal No. 91100, dated January 22, 1992.

The evidence in the record is sufficient to support the findings of fact and conclusions of law made by the hearing officer, including Finding of Fact No. 4, which said claimant sustained a lumbar injury while working for employer on (date of injury). Medical records are sufficient to support the finding of fact that said claimant's psychological problems were not shown to be caused by the injury. In this regard Dr. H, the neurologist, said that the relationship between the injury and the psychological problems was complex. On the other hand, Dr. J, the psychiatrist, indicated that the problem was a physical one of the back. The hearing officer could question the psychological problem when Dr. J, in a medical specialty which should have knowledge of such matters, did not describe claimant's problems as being psychological. In addition, claimant testified that she did not think she had a psychological problem.

The hearing officer was sufficiently supported in stating that the designated doctor's opinion was not overcome by the great weight of other medical evidence because Dr. Sc also found MMI on July 16, 1992. Dr. Bl did not address the question directly but indicated in July that her injury had resolved, that disability would continue 8 to 12 weeks while seeing a psychologist, and said that claimant did not need surgery. Dr. C's comments in February 1992, were not inconsistent with MMI in July 1992. Dr. B noted that her symptoms, such as twitching, were greater when she knew she was being observed. Dr. H described the claimant's problems as complex, but did not indicate that MMI would not be reached for an extended period of time. In addition, Texas Workers' Compensation Commission Appeal No. 92394, dated September 17, 1992 stated that MMI does not mean that the claimant will always be free of pain. The hearing officer in attaching a presumption to the designated doctor's report also had sufficient evidence to find that the great weight of other medical

evidence did not contradict it as to the impairment rating it assigned.

Claimant cites several cases for the proposition that under workers' compensation law prior to the 1989 Act, a neurosis could result from physical injury and could be disabling. The leading case for that proposition was Hood v. Texas Indemnity Insurance Co., 146 Tex. 522, 209 S.W.2d 345 (1948). That case also pointed to the conflicting medical evidence at the trial. It acknowledged that the finder of fact could believe either side and stated that the trier of fact could have rejected the opinion of the doctor it chose to believe. The question of the neurosis was one for the finder of fact to decide.

The question of injury, disability, MMI, and impairment were all questions of fact for the trier of fact, the hearing officer. In the case on appeal the hearing officer chose to believe the evidence in support of the designated doctor and to believe that claimant had not shown that psychological problems were caused by the injury. The evidence sufficiently supports his decision.

We would point out that medical care questions are not raised before this panel, but that Peebles v. Home Indemnity Co., 617 S.W.2d 274 (Tex. Civ. App.-San Antonio 1981, no writ) reversed a trial court's decision, on the basis of the great weight of the evidence, that medical care for psychiatric problems related to a knee injury was not necessary. Finding that the decision and order are not against the great weight and preponderance of the evidence and do not address medical benefits, we affirm.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge